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NO. 03-710

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondent Does Not Dispute The Existence Of A Conflict On An Important Issue Of Fourth Amendment Law

In the petition we explained that there is a significant conflict among the circuits on an important issue of Fourth Amendment law. Pet. 9-12. The Eleventh and D.C. circuits hold that if probable cause does not support an arrest for the offense cited by the arresting officer, the arrest is valid if the officer had probable cause to arrest for another offense. The Fifth, Sixth, Seventh, Eighth, and Ninth Circuits hold that the arrest is only valid if the two offenses are closely related. The Ninth Circuit's decision in this case also conflicts with decisions of the Washington and California Supreme Courts. Pet. 17-18. Amicus Curiae Brief of the State of California, ex rel., Bill Lockyer, Attorney General, in support of Petitioner.

Respondent Alford does not deny that there is a conflict. He simply argues that the closely related offense doctrine is correct. Br. Opp'n 1 ("This is the rule in the clear majority of Circuits that have considered the issue, and comports with the precedents, and spirit, of qualified immunity."). Alford's belief that the Ninth Circuit's decision in this case is correct is irrelevant. There is a significant conflict among the circuits (and with Washington and California) that should be resolved by this Court.

This conflict involves an important issue of Fourth Amendment law that can arise in two contexts. The first is the situation – like this case –

where a plaintiff is seeking damages for false arrest in a civil rights action. The second occurs when a criminal defendant seeks to suppress evidence on the grounds that it is the fruit of an improper arrest. *See, e.g., United States v. Bookhardt*, 277 F.3d 558 (D.C. Cir. 2002). This issue also has significant implications for the criminal justice system. As we explained in the petition, the closely related offense doctrine will lead to stacking charges and improperly usurps the prosecutorial function. Pet. 18-21. Alford does not contest these points or the significance of the issue.

2. The Brief In Opposition Misconstrued The Fourth Amendment's "Objective Reasonableness" Test And Advocates An Interpretation Which Is Inconsistent With The Decisions Of This Court

Alford (Br. Opp'n 6-7) and the majority opinion below (Pet. 12(a) n.2) erroneously contend that by looking to whether probable cause exists for unrelated crimes a court would necessarily have to inquire into the subjective beliefs or motivations of the officer which would "eviscerate the objective reasonableness standard" that is applicable under both the Fourth Amendment and qualified immunity analysis. This interpretation of objective reasonableness turns the test on its head. It is in fact, the closely related offense doctrine that injects an "impermissible element of subjectivity" into the objective reasonable test. The closely related offense doctrine keys on the stated, subjective reason given by an officer for the existence of probable cause, rather than properly focusing on the totality of facts and circumstances known to the officer at the time of arrest. *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Whren v. United States*, 517 U.S. 806 (1996); *Scott v. United States*, 436 U.S. 128 (1978).

This case is a perfect example. The officers had probable cause – based on the facts and circumstances known at the time – to arrest Alford for impersonating an officer and obstructing a public servant. The officers also thought that the facts and circumstances provided probable cause to support an arrest for violation of the Privacy Act. The officers discussed these charges with a deputy prosecuting attorney who agreed they had probable cause to arrest. Pet. 18a, 42a-43a. The fact that the offenses of impersonating an officer or obstructing a public servant are not closely related to a violation of the Privacy Act is irrelevant. The objective facts and circumstances known to the officers at the time of arrest provided probable cause to arrest for those two offenses. The officers' incorrect subjective belief that there was a violation of the Privacy Act does **not** eliminate probable cause to arrest for the other two offenses.

3. The Brief In Opposition Misconstrues The Qualified Immunity Issue Presented By Petitioners

Alford addresses the wrong qualified immunity issue, focusing on probable cause to arrest for the Privacy Act violation. Br. Opp'n 10-11. The issue is whether it was clearly established that probable cause could be found to exist only for closely related offenses.

The issue of what was clearly established changed between the time of trial and appeal. Prior to trial, the district court judge held that lack of probable cause to arrest for a violation of the Privacy Act was clearly established. The judge, however,

sent the issue of qualified immunity to the jury on the question of whether Defendants could have reasonably believed they had probable cause to arrest for that crime. Pet. 61a-62a.

The issue of probable cause was not limited to the Privacy Act. At trial the jury heard testimony and argument, without objection, that probable cause existed for the crimes of impersonating and obstructing a public servant. Pet. 42a-43a. Under the unchallenged instructions, the jury was authorized to find the existence of probable cause for any crime as a defense. Pet. 45a-58a.

On appeal, Alford did not belatedly raise the closely related offense doctrine. Instead, the Court of Appeals raised that issue on its own, a few weeks before oral argument. Pet. 24a. The majority opinion then held that the effect of the closely related offense doctrine was to preclude consideration of probable cause that the jury inherently found for the crimes of impersonating and obstructing. The Ninth Circuit then went one step further in deciding the qualified immunity issue, and ruled that the applicability of the closely related offense doctrine was clearly established.[1]

The Court does not need to reach the qualified immunity issue if it agrees with Petitioner's first argument that the closely related offense doctrine is contrary to the Fourth Amendment's objective

[1] The majority reached this conclusion even though that decision was contrary to state law, *Washington v. Huff*, 64 Wash. App. 641, 826 P.2d 698, *review denied*, 119 Wash. 2d 1007 (1992), and the fact that the Ninth Circuit's prior discussion of the closely related offense doctrine in *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied sub nom. Ball v. Gasho*, 515 U.S. 1144 (1995), was dicta in a footnote.

reasonableness test. Should the Court address this issue, the law cannot be said to be clearly established when there is a split in the federal circuit courts and state court case law has determined that it is constitutionally permissible to consider the existence of probable cause for any crime in upholding an arrest. In such case, the public officials are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194 (2001); *Hunter v. Bryant*, 502 U.S. 224 (1991).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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